

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

JOSE DE JESUS ROQUE LOPEZ :
and BONIFACIO BARTOLO JUSTO, : 18-CV-5639(PKC)

Plaintiffs, :
- against - : United States Courthouse
Brooklyn, New York

PRONTO PIZZA LLC, et al., :
Defendants. : July 10, 2019
11:00 o'clock a.m.

- - - - - X

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: MICHAEL FAILLACE & ASSOCIATES
60 East 42nd Street Ste 4510
New York, NY 10165

BY: PAUL HERSHAN, ESQ.

For the Defendants: MANATT, PHELPS & PHILLIPS, LLP
7 Times Square
New York, NY 10036

BY: VINCENT C. PAPA, ESQ.
BRIAN J. TUROFF, ESQ.

Court Reporter: Charleane M. Heading
225 Cadman Plaza East
Brooklyn, New York
(718) 613-2643

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 THE CLERK: Civil cause for oral argument. Docket
2 18-CV-5639. Lopez, et al. versus Pronto Pizza 02 LLC, et al.

3 Will the parties please state their appearances for
4 the record.

5 MR. HERSHAN: For the plaintiffs, for Michael
6 Faillace & Associates, Paul Hershan. Good morning,
7 Your Honor.

8 THE COURT: Good morning.

9 MR. PAPA: Good morning, Your Honor. Vincent Papa
10 from Manatt Phelps & Phillips for all the defendants.

11 THE COURT: Good morning.

12 MR. TUROFF: Good morning, Judge. Brian Turoff,
13 also from Manatt Phelps & Phillips, for the defendants.

14 THE COURT: Good morning, everyone.

15 So we are here for the motion on partial motion to
16 dismiss of the defendants and in their motion, they seek to
17 dismiss the claims against two of the three individual
18 defendants Dashnor Miftari and Besnik Stevie Miftari who I
19 gather goes by the name of Stevie and then also to dismiss the
20 claim for equipment costs raised by one of the plaintiffs
21 Mr. Jesus Roque Lopez.

22 So I will allow the parties to elaborate on their
23 arguments if you'd like, though these issues are relatively
24 straightforward and obviously we are amenable to expedited
25 briefing as I directed.

1 So if you would like to be heard further, Mr. Turoff
2 or Mr. Papa, on your motion, feel free. If it helps you, I
3 will tell you that I am not inclined to grant the motions to
4 dismiss as to the two individual owners. The allegations that
5 you say are boilerplate are not as boilerplate, I think, as
6 you contend and at this point, I think they do suffice to at
7 least create a reasonable inference that these two individuals
8 were owners.

9 I take into consideration the common sense view of
10 this case which is this is a small, seemingly family-owned
11 business involving these three relatives and that logically,
12 the one as to whom the strongest case can be made about a
13 motion to dismiss, Dash Miftari, is a self proclaimed owner
14 and while he may not be there day to day managing the
15 businesses like the other two, I certainly think it is
16 reasonable to infer that he does qualify as an employer based
17 on his own statements and some of his actions as alleged by
18 the plaintiff.

19 So perhaps with that as an introduction, you can go
20 ahead and argue whatever else you think is important.

21 MR. PAPA: Okay, Your Honor. Would you like me to
22 use the lectern?

23 THE COURT: No. No. You can stay where you are.
24 You can either sit or stand, however you're most comfortable.

25 MR. PAPA: Thank you, Your Honor.

1 So as you summarize, Your Honor, the defendants are
2 seeking dismissal of all the claims as interposed against the
3 individual defendants, Stevie Miftari and Dash Miftari, and
4 complete dismissal of Count Eight which is the tools of the
5 trade claim.

6 As you were alluding to, only employers may be held
7 liable under New York Labor Law and FLSA violations and as
8 Your Honor is well aware, in the Second Circuit, in the Carter
9 versus Dutchess case, the Second Circuit articulated the four
10 factor test that is grounded in the economic realities of the
11 situation. Very quickly, those factors are, of course,
12 whether the alleged employer had the power to hire and fire
13 employees, whether they supervised and controlled employee
14 work schedules or controlled the conditions of their
15 employment, whether they determined the rate and method of pay
16 and whether they maintained employment records.

17 THE COURT: A little bit slower and bear in mind,
18 you have a court reporter recording you.

19 MR. PAPA: My apologies, Your Honor.

20 Now, it is routinely held in this Circuit that
21 simply reciting these factors is not enough to state a claim.
22 For example, we cite several cases in our papers. Your Honor,
23 we would like to direct you to Chen versus Hunan Manor and
24 Lin --

25 THE COURT: The first is S-H-I, M-E-N-G, Chen.

1 MR. PAPA: Yes.

2 THE COURT: Versus Hunan Manor Enterprise, Inc.
3 Just so it's clear on the record.

4 MR. PAPA: Yes.

5 THE COURT: Okay. Go ahead.

6 MR. PAPA: Also Lin versus Benihana and the Apolinar
7 case.

8 THE COURT: A-P-O-L-I-N-A-R. That's the one you're
9 referring to?

10 MR. PAPA: Yes, that's correct. Thank you,
11 Your Honor.

12 And in those cases, as we elaborate on in our
13 papers, courts dismissed in almost analogous circumstances
14 where the allegations are just vague and conclusory
15 resuscitations, they are resuscitations of the Carter factors.

16 As it relates to Dash Miftari, as you know,
17 Your Honor, the plaintiff has only alleged that he came to the
18 business two to three times a week and issued some
19 unidentified orders to the plaintiffs, but these allegations
20 don't elaborate -- there's nothing more than an allegation
21 that's vague and conclusory and related only to the second
22 Carter factor. And in particular, that allegation does
23 nothing to add any detail but what types of orders or what
24 businesses that he came to and what order -- who he was
25 directing these orders to, in particular, because, remember,

1 there's two plaintiffs here, and courts in the Circuit and, in
2 particular, in the MacIntyre case, the court found where you
3 only allege a single Carter factor in a conclusory fashion,
4 that type of deficient pleading warrants dismissal.

5 Moving to the second individual defendant,
6 Your Honor, Stevie Miftari, those allegations are equally thin
7 and conclusory as well. They allege that he hired plaintiffs,
8 allegedly set pay rates and issued, again, some unidentified
9 orders to some plaintiff we don't know which one and we don't
10 know what the orders were, and these vague allegations are
11 nothing more than conclusions couched as factual allegations
12 which is precisely the type of pleading that this court found
13 was insufficient in the Coley v. Vannguard case in a 2014
14 opinion.

15 THE COURT: Can I stop you there? You know that's
16 my opinion.

17 MR. PAPA: Yes, Your Honor.

18 THE COURT: But the facts there are so vastly
19 different. I mean, I know you belittled the argument that
20 Coley involved a board member, but that was a significant
21 factor because that was someone who didn't have any day-to-day
22 operational management of the employees or of the overall
23 business. There was, in fact, an executive director for one
24 of the Vannguard organizations and the person as to whom I did
25 grant the dismissal really was a board member and to me,

1 that's functionally and very concretely different than what
2 we're talking about here which are three purported owners and
3 managers of a business, two of whom at least were there day to
4 day and one of whom you just, as you just mentioned, is
5 alleged to have been there two to three times a week. I think
6 we have a vastly different situation. So Coley in my mind
7 really isn't applicable here but go ahead.

8 MR. PAPA: All right. Well, I guess drawing on
9 Coley or just pausing on Coley for a second, I think there,
10 Your Honor, and in both instances, the plaintiffs fail to
11 allege how particularly Dash actually controlled the
12 day-to-day operations and actually had some bearing on the
13 plaintiffs' employment. They don't really allege how they,
14 how either Dash or Stevie specifically controlled and
15 supervised their employment.

16 We'd like to remind, Your Honor, that this, that the
17 first amended complaint was filed in response to our
18 February 1st letter in which we exposed the deficiencies in
19 their pleadings. So in their second bite at the apple,
20 Your Honor, that was all that they were able to come back with
21 in way of allegations. Both Dash and Stevie which are pretty
22 conclusory and, Your Honor, we would also like to, you know,
23 point out the fact that these defendant businesses are
24 pizzerias. They're not, they're not conglomerates or they're
25 not corporations like in Vannguard where perhaps some sort of,

1 you know, further factual investigation or time was needed to
2 sort of develop these allegations. They would either know or
3 they wouldn't whether or not Stevie and Dash, you know,
4 actually controlled their employment and in this case, it's
5 clear from the pleadings and the amended complaint that they
6 didn't.

7 THE COURT: But don't you think the argument cuts
8 the other way? Because that's my view of it too, that these
9 are pizza parlors where the day-to-day operations are being
10 run by at least these two individuals who are also owners and
11 presumptively related to each other. So you're talking about
12 a situation where the plaintiffs are working day-to-day, side
13 by side with these individuals, and they say this person hired
14 me, this person set my pay rates, this person told me how to
15 perform my job, this person could fire me or discipline me.

16 Yes, I understand that you think that that just
17 mirrors what is required under the test, but when you are
18 talking about individuals who aren't in some large
19 conglomeration or some corporate entity, who are in a pizza
20 parlor, it strikes me that this is what they ought to be
21 saying. I agree with you that they could have particularized
22 it. So rather than say, for example, the person hired me,
23 they can say, Oh, I met with Stevie Miftari on X date and he
24 interviewed me and then he gave me a job 10 these many years
25 ago because I know both of them have been working there since

1 2012, admittedly, there could be more meat on this complaint,
2 but under the circumstances, I think it would be irresponsible
3 of me simply to dismiss it because there could have been a
4 better pleading job when it seems apparent to me that these
5 plaintiffs do know these defendants and these are the
6 defendants or these are the employers who are actually working
7 with them day to day who own the pizza shop and who tell them
8 what to do and who clearly have the ability to hire, fire or
9 give them raises or not.

10 Could they have put more meat on this? For sure.
11 Can I make a reasonable inference that these three individuals
12 are all owners and employers, owners of the shops and
13 employers of these individuals? Yes. I mean, the standard is
14 relatively forgiving at this point and it would be very much
15 against my general practice to dismiss the claims against
16 these individuals at this point despite what I think you
17 accurately point out is not optimal pleading, but go ahead.

18 You look like you want to say something, Mr. Papa.
19 Oh, you're Mr. Turoff.

20 MR. TUROFF: Judge, I was going to say I think
21 that's sort of the whole idea. What you have here, you're
22 right, these are two guys who are in the pizza place every
23 day, every day, and it's a pizza place. It's probably maybe
24 not bigger than this area of the room.

25 THE COURT: You're saying why can't they be more

1 particular?

2 MR. TUROFF: Well, obviously, on that point, I mean,
3 isn't that the whole idea, that if you are supposed to plead
4 in a certain manner and have a certain degree of specificity,
5 that, ultimately, you are supposed to have that? And this is
6 a circumstance where this is their second try.

7 So what you have is two guys who, by their own
8 admission, have been going to this pizza place for years,
9 every day. They go every single day. So you would assume, by
10 definition, they know who goes in and comes out. And after
11 two tries, the best they can do is come up with two
12 allegations, maybe three allegations against Dash Miftari?

13 I would actually suggest, again, for two guys, know
14 the comings and goings --

15 THE COURT: Slowly, for the court reporter.

16 MR. TUROFF: Sorry.

17 -- and by the way, have made allegations that are
18 much more specific as opposed to a different defendant which
19 is Kash Miftari, I think that the whole idea that they were
20 able to draw that distinction and say, Hey, this guy is here
21 all the time and this guy does all this stuff, and after years
22 being there, in a space this big, I would imagine that all of
23 you sitting here know who comes in and who goes out and you
24 could tell us what those people do. After two separate bites
25 of the apple, after coming up with two allegations against

1 Dash Miftari, I would think under that circumstance, look, I
2 understand that certainly, I understand --

3 THE COURT: Stop. Stop. Stop. Again, please be
4 mindful of our court reporter.

5 MR. TUROFF: Sorry. I'm slowing down only on the
6 important parts.

7 But, ultimately, again, I think that it's important.
8 I understand certainly that caution is important and,
9 obviously, we wouldn't suggest that the Court be hasty as to
10 who should be in and who should be out, but I think there's
11 some fairly clear inferences to be drawn, in particular, as it
12 relates to the distinction between what is being alleged for
13 Kash, who you'll note we are not suggesting should be released
14 at this stage, as opposed, for example, to Dash, again, under
15 a circumstance where they've had two chances to actually
16 articulate more and had the opportunity to use our motion as
17 their road map to improve it and have still failed to do that.

18 THE COURT: Okay. Fair enough. I do understand
19 your arguments.

20 I will hear from you, Mr. Hershan. I mean, as you
21 have heard, the defense makes some good arguments about the
22 fact that more should be expected of these plaintiffs in terms
23 of the allegations and the particularity of these allegations
24 given the close relationship they allegedly have with these
25 three defendants.

1 Now, with respect to Dash, I understand that the
2 allegation is that he was only there two to three times a week
3 and per force, the allegations to him would be limited but,
4 nevertheless, you do allege that he issued orders. So the
5 question becomes what more can your clients say which, quite
6 frankly, should have been in the complaint about these
7 individuals.

8 MR. HERSHAN: Your point is well taken that we could
9 do done a better job particularizing the nature of this
10 complaint but I do think as it's amended, it does, under our
11 legal requirements, a sufficient job of making particular
12 allegations as to each defendant and sufficiently alleging
13 that each of these defendants were employers of these
14 plaintiffs.

15 We do not need to include specific evidence in these
16 complaints and I think we have sufficiently alleged all three
17 of these individual defendants ordered us at this pizzeria,
18 some of them hired us. As it particularly pertains to Dash,
19 he's there two to three times per week. He says, I can tell
20 you guys what to do, in other words, and if he's issuing
21 orders to a cook and a food preparer in a pizzeria, I think
22 it's more than reasonable for Your Honor to infer from that
23 description in paragraph ten of the amended complaint, that
24 he's telling them, Guys, I need you to make X amount of
25 pizzas.

1 I think that's entirely reasonable for you to infer
2 that he's giving orders of that nature at the pizzeria based
3 on the four corners of this complaint. I think it's
4 sufficiently alleged as to him that you can reasonably infer
5 that he was an employer of these plaintiffs.

6 THE COURT: Let me say this. As I expressed
7 earlier, I don't have much doubt that the allegations, that
8 there are allegations that are -- let me try to put it -- that
9 the facts actually warrant charging or naming these three
10 individuals, but this is more about policing the practice to
11 some extent because I think your takeaway from this should be
12 that in the area of FLSA, and the labor law cases, you do need
13 to be more particular so as to avoid at least these kinds of
14 motions which the defendants are technically correct about
15 because there's a fine line between parroting the words of the
16 statute and actually making a factual allegation.

17 As I said before, even to say this person hired me,
18 you can very easily provide some detail that would support
19 that claim because, otherwise, it feels and sounds and looks
20 like a boilerplate allegation that simply shadows the
21 statutory language or the economic realities test. While I
22 understand your position that it's enough, I think you should
23 take away from it that there should be more next time because
24 there is no reason to have a motion filed if, in fact, as I
25 believe to be true and as I infer to be true, these plaintiffs

1 do have more specific information that would support the
2 employer status of each of these individuals. With respect to
3 Dash, I think there is for sure the closest question, but
4 still I think it suffices but just barely, I would say.

5 So I want you to take away and take back to your
6 firm because I do think you practice in this area a lot that
7 it would behoove you, especially when you have individuals who
8 were working there for six years or more, that they should be
9 able to come up with some specific examples and you do not
10 have to have a laundry list. You just have to have enough to
11 fend off a motion and to give the judge some comfort that
12 these are, in fact, the employers who were making all of the
13 key decisions under the economic realities test. Okay?

14 MR. HERSHAN: Judge, I assure you, I'll relay that
15 message.

16 And then just to address the final point here,
17 plaintiffs will concede as to equipment costs for Plaintiff
18 Bartolo. That plaintiff did not have a claim for recovery of
19 equipment costs so we would concede dismissal as to that
20 plaintiff. It's Plaintiff Bartolo, not Plaintiff Lopez.

21 THE COURT: My apologies. So it was Bartolo and not
22 Roque?

23 MR. HERSHAN: Right.

24 THE COURT: So you are withdrawing that claim?

25 MR. HERSHAN: As to that one plaintiff, correct.

1 THE COURT: And it was only made as to that one
2 plaintiff, right?

3 MR. HERSHAN: Well, we made the claim as to
4 Plaintiff Roque. So they were seeking to dismiss the claim, I
5 believe, as to Plaintiff Bartolo when we're not disputing that
6 it should be dismissed as to Plaintiff Bartolo because he
7 doesn't have a recovery equipment cost claim.

8 THE COURT: Oh, I see. Fair enough. I might be
9 mistaken. I'm looking at your -- oh, I see. I think your
10 claim is only as to --

11 MR. HERSHAN: It's as to Roque, Your Honor.

12 THE COURT: So you made that clear, that's right, in
13 your supplemental submission, that you are only bringing it as
14 to Lopez now.

15 MR. HERSHAN: Correct.

16 THE COURT: Docket 28, page three -- that's not
17 right. Maybe I'm reading the wrong page. My mistake. I'm
18 sorry. Page five. You say, Plaintiff Roque is the only
19 plaintiff making the tools of the trade claim. That's what
20 you say on page five.

21 MR. HERSHAN: Correct.

22 THE COURT: So that is consistent with your
23 withdrawal at this point of the claim as to Bartolo.

24 MR. HERSHAN: As to any tools of the trade claim
25 that would apply to Plaintiff Bartolo, that's withdrawn.

1 THE COURT: So it is an accurate statement that the
2 defense is still moving to dismiss the tools of the trade
3 claim as to Roque?

4 MR. PAPA: Yes, Your Honor.

5 THE COURT: Okay. Do you have any response to that?
6 Because there, I think you are going to have a serious
7 problem, Mr. Hershan. There is nothing in your complaint that
8 suggests that there is anything special about this equipment
9 that relates to what he does in his work such that it
10 qualifies as tools of the trade. You literally have mentioned
11 socks, shoes, pants, shirts, and he's a chef and all you say
12 is that he needs special kinds of shoes and socks and pants
13 because he's a chef.

14 MR. HERSHAN: Well, you do need special shoes in the
15 kitchen. You need non-slip shoes and that's what he's
16 alleging here, that he had to purchase certain shoes in order
17 to do his job safely working in a pizza kitchen.

18 THE COURT: Right now, that allegation is not going
19 to be sufficient. You haven't particularized that at all.
20 Moreover, it is not in your complaint. It's only in your
21 supplemental briefing so that I cannot consider.

22 The question is whether or not I let you amend. I
23 mean, this would be your second amendment. Again, I'm not
24 sure that -- this is a claim, I think, that I am prepared to
25 dismiss certainly as to the shirts, the pants and the hats. I

1 thought I saw a claim for socks, maybe I'm wrong, but shirts,
2 pants and hats. Again, all you say in your supplemental
3 briefing which is docket 28 at page five is that he needed
4 particular clothes to withstand the rigors of a kitchen. That
5 is not suffice because it is not in the complaint and it does
6 not give any specific factual support. So that claim is going
7 to be dismissed.

8 If you have more on that, something particular about
9 any of those pieces of equipment as you called them, you can
10 move to amend and explain why you should be allowed to amend
11 again on that basis but for now, that claim is going to be
12 dismissed. So there's no more equipment claim in this case as
13 of now, however, as per my earlier statements, I am going to
14 allow the claims to continue against Dash Miftari and Stevie
15 Miftari. Let me just put on the record my reasoning on that.

16 First of all, as was mentioned by the defense, the
17 Second Circuit applies an economic realities test for courts
18 to use in evaluating whether the alleged employer or whether
19 the alleged defendant is an employer.

20 The elements of the test were set forth by the
21 defense: One, did the alleged employer have the power to hire
22 and fire employees; two, did the alleged employer supervise
23 and control the employees' work schedule or conditions of
24 employment; three, did the alleged employer determine the rate
25 and method of payment; and, four, did the alleged employer

1 maintain employment records. This is from Carter versus
2 Dutchess Community College which was referenced by the
3 defense, 735 F.2d 8, at 12, a Second Circuit case from 1984.

4 While control is an essential aspect of the employer
5 test, such status does not require continuous monitoring of
6 employees, looking over their shoulders at all times, or any
7 sort of absolute control of one's employees. And that comes
8 from a Second Circuit case, Herman versus RSR Security
9 Services Limited, 172 F.3d 132, at 139, a Second Circuit case
10 from 1999. Moreover, control may be restricted or only
11 exercised occasionally while still rendering a defendant as an
12 employer. Again, citing Herman which, in turn, cites Brock
13 versus Superior Care Inc., 840 F.2d 1054, a Second Circuit
14 case from 1988.

15 No one factor in the economic realities test is
16 dispositive and the inquiry into an employment relationship is
17 fact-intensive. For that, I'm going to cite Barfield versus
18 New York City Health and Hospitals Corporation, 537 F.3d 132,
19 at 141 to 143.

20 And, furthermore, the Second Circuit has
21 consistently reiterated the necessary flexibility of the
22 economic realities test, a flexibility that is needed to
23 ensure that the economic realities test mandated by the
24 Supreme Court is sufficiently comprehensive and flexible to
25 give proper effect to the broad language of the FLSA. There I

1 am citing De Jesus versus Empire Szechuan Noodle House Inc.,
2 2019 Westlaw 1789901, at page 6, a Southern District of
3 New York decision, April 24, 2019, which, in turn, quotes the
4 Barfield case I mentioned earlier at 537 F.3d 143.

5 To the extent that the defense has argued that
6 plaintiffs' claims are boilerplate, I disagree that they are
7 as boilerplate as the cases cited and relied upon by the
8 defendant, namely, the Shi Meng Chen case discussed earlier
9 and certainly the Coley case which I referenced earlier as
10 well. In those cases, the pleadings were much more
11 boilerplate and barebones. There was another case, the
12 Apolinar case that we discussed earlier. Those were very
13 different circumstances in my mind and very distinguishable,
14 especially Apolinar was a case involving a group of corporate
15 defendants where there was an allegation that they were joint
16 employers that operated as a single integrated enterprise. So
17 I think that is quite different here than where we are talking
18 about two pizza parlors that are owned, it appears, by three
19 individuals and operated by them. In the case of Shi Meng
20 Chen, the allegations were more boilerplate and as to one of
21 the defendants, the only factual allegation was that she was
22 referred to as "Lady Boss."

23 Here, I find, in contrast, the plaintiffs have
24 provided some detailed allegations albeit, as I said before,
25 not nearly as detailed as they really ought to be to fend off

1 such a motion.

2 As to defendant Stevie Miftari, the plaintiffs have
3 alleged that he hired them, he set their pay rates, he
4 instructed them on how to perform their work, he had the power
5 to fire and discipline them and he possessed operational
6 control and an ownership interest in the Pronto Pizza parlor.

7 With respect to Dash Miftari, as we discussed, the
8 allegations are that he came to the Pronto Pizza locations two
9 to three times a week, that he issued orders to the
10 plaintiffs, that he represented himself as an owner of Pronto
11 Pizza, that he had the power to fire and discipline plaintiffs
12 and that he possessed operational control and an ownership
13 interest in the Pronto Pizza chain or chain if you want to
14 call it that.

15 I do find that I can make the reasonable inference
16 that the defendants were plaintiffs' employers under the
17 relative standards that I have just recited. In addition,
18 I'll cite Compagnone versus MJ Licensing Company, 2019 Westlaw
19 1953931, at page three, a Southern District of New York
20 decision from May 2, 2019. There, the Court similarly found
21 that while some of the language is boilerplate, at this stage,
22 the allegations in plaintiffs' complaint need only be
23 plausible and the Court simply must be able to make a
24 reasonable inference that defendants were plaintiffs'
25 employers and that's what I do find here.

1 As I said before, the equipment cost claim of
2 plaintiff Roque Lopez is being dismissed and to recite some of
3 the standards there, a uniform to qualify as a tool of the
4 trade must be specifically required for the performance of the
5 employers' particular work. That comes from 29 CFR
6 Section 531.35. And cannot, therefore, consist of ordinary
7 wardrobe items, citing Cocoletzi versus Fat Sal's Pizza II
8 Corp., 2019 Westlaw 92456, at page 7, Southern District of
9 New York, January 3, 2019. Likewise, New York law excludes
10 from the definition of a uniform any clothing that may be worn
11 as part of an employee's ordinary wardrobe. There I will cite
12 12 NYCRR Section 146-3.10. New York law defines "ordinary
13 wardrobe" as basic street clothing selected by the employee
14 where the employer permits variations in details of dress.
15 12 NYCRR Section 146-3.10 again.

16 So when a plaintiff seeks to claim that his work
17 clothing is a tool of the trade, courts require the plaintiff
18 to plead facts that suggest whether and why the particular
19 items were required for the plaintiff's work, citing Hernandez
20 versus Spring Rest Group LLC -- and forgive me folks, I'm
21 going to recite a few cases for the record -- 2018 Westlaw
22 3962832, at page 4, Southern District of New York, August 17,
23 2018. Cocoletzi, the same case I cited earlier, versus Fat
24 Sal's Pizza, 2019 Westlaw 92456, at page 7. Then Gunan Ming
25 Lin versus Benihana National Corp., 755 F.Supp.2d 504, at 512,

1 Southern District of New York, 2010.

2 Here, as I said before, the plaintiffs did not
3 include anything in their amended complaint explaining how
4 Roque Lopez's six shirts, eight pairs of pants, 30 pairs of
5 shoes and 30 hats qualified as special clothing or equipment
6 that he had to wear in his capacity as a chef at the
7 defendants' pizza parlor. Only in the supplemental briefing
8 did the plaintiffs include what I have characterized as a
9 conclusory claim that Roque Lopez needed to purchase
10 particular clothes to withstand the rigors of a kitchen, but
11 because this allegation does not appear in the amended
12 complaint, I have not considered it and cannot consider it.

13 For that, I will cite *In Re Agape Litigation*,
14 773 F.Supp.2d 298, at 316, an Eastern District of New York
15 case from 2011, which stated that it is well settled that a
16 plaintiff cannot amend the complaint through briefs and
17 affidavits and such facts are thus irrelevant for purposes of
18 determining whether the plaintiff's complaint should be
19 dismissed for failure to state a claim.

20 So, I conclude that Mr. Roque Lopez's claim for
21 equipment costs must be dismissed for failure to state a
22 claim.

23 As I mentioned earlier, if, for some reason, the
24 plaintiff feels that they can make more particularized factual
25 allegations to support that equipment or tools of the trade

1 claim, they can move to amend and they will have to set forth
2 the grounds for why they should be allowed to as a second
3 amended complaint.

4 All right. So those are my rulings on this and I
5 think that resolves the pending motion to dismiss.

6 The parties obviously should move forward with
7 discovery, if you have not already. I am assuming you have
8 since this is a 2018 case. Is that correct? I haven't
9 checked the docket, but have you met yet with the
10 Magistrate Judge for an initial conference?

11 MR. TUROFF: No, we have not, Judge.

12 THE COURT: So the Judge obviously will set one up.
13 That's Judge Scanlon.

14 MR. TUROFF: Excuse me, Judge. As it relates
15 specifically to the allegations on Dash and Stevie, we
16 understand your ruling. We would -- we wondered if you would
17 consider, I mean, given the fact that the -- obviously, the
18 whole point in the complaint in the first place is to give
19 notice of allegations against the defendants and I think we
20 all recognize that, obviously, even though this may be close
21 to the line, that there is obviously some question as to
22 whether or not there is sufficient particularity.

23 We would ask you to consider ordering plaintiffs to,
24 in fact, file a second amended complaint to amplify the
25 allegations specifically as it relates to Dash and Stevie

1 Miftari only.

2 THE COURT: All right. I think that's not an
3 unreasonable suggestion. Obviously there are other ways to
4 achieve that through discovery or statements that you could
5 demand, but I think because, as I said, this should be about
6 improving the practice as well or policing it, I am going to
7 grant that request.

8 So, Mr. Hershan, how long would you need to file an
9 amended complaint that does beef up and provide more
10 particular allegations as to both of those defendants?

11 MR. HERSHAN: I'm going to be out of town next week
12 and some the week after. If I can have three weeks, is that
13 sufficient?

14 THE COURT: All right. I will give you three weeks
15 to do that. So that is --

16 THE CLERK: July 31st.

17 THE COURT: -- July 31st. So you have until the end
18 of the month to do that. Then I will let Judge Scanlon know
19 that she can have you come in soon thereafter to begin the
20 pretrial process. Okay?

21 All right. Thank you, everyone. I appreciate your
22 argument.

23 MR. HERSHAN: Thank you, Judge.

24 (Matter concluded.)
25